IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1473

NADEAN O. McARTHUR,
Petitioner,

versus

THE HONORABLE PHILIP G. NOURSE,
Circuit Judge of the
Nineteenth Judicial Circuit of Florida,
in and for Okeechobee County,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Petitioner, Nadean O. McArthur, respectfully prays that a writ of certiorari issue to review the final order of the Supreme Court of Florida entered in this case on March 31, 1978. That final order denied a suggestion for writ of prohibition seeking to prevent respondent Circuit Judge from proceeding to retry petitioner on an indictment charging murder in the first degree, after a prior conviction for that offense had been reversed by the Supreme Court of Florida on the sole ground that the evidence had been legally insufficient to support the conviction.

The question presented by this petition for writ of certiorari is identical to that presented to this Court in *Greene* v. *Massey*, 546 F.2d 51 (5th Cir.), *cert. granted*, 432 U.S. 905 (1977) (No. 76-6617), which case was argued before this Court on November 28, 1977.

OPINIONS BELOW

The order of the Supreme Court of Florida denying petitioner's suggestion for writ of prohibition is as yet unreported, but is reproduced as Appendix A hereto. The order of the Circuit Court of the Nineteenth Judicial Circuit of Florida, in and for Okeechobee County, denying petitioner's motion to dismiss the indictment on the ground that a retrial would place petitioner twice in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments to the United States Constitution is likewise unreported, but is reproduced as Appendix B hereto. The opinion of the Supreme Court of Florida reversing petitioner's prior conviction for the offense of first degree murder is reported at 351 So.2d 972, and is reproduced as Appendix C hereto.

JURISDICTION

The order of the Supreme Court of Florida denying petitioner's suggestion for writ of prohibition was entered on March 31, 1978. This Court has jurisdiction to review that order by writ of certiorari pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

Whether, when the highest court of a state has previously reversed a conviction of first degree mur-

der on the sole ground that the evidence was legally insufficient to support the conviction after petitioner had unsuccessfully moved for a judgment of acquittal on that ground in the trial court, retrial of petitioner for the same offense is barred by the double jeopardy clause of the Fifth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner's husband, Charles M. McArthur, died on June 10, 1973, as a result of a gunshot wound. On August 30, 1973, petitioner was indicted by an Okeechobee County, Florida, Grand Jury. The indictment charged petitioner with the first degree murder of her husband.

Petitioner's trial on that indictment commenced on April 14, 1975. At the conclusion of the State's case, petitioner moved for entry of a judgment of acquittal on the ground that the evidence presented by the State failed to prove that the death of Charles M. McArthur was anything other than an accident, and that therefore the evidence was insufficient to prove the offense charged in the indictment beyond and to the exclusion of a reasonable doubt. This motion was denied by the trial judge.

At the conclusion of all the evidence, petitioner again moved for a judgment of acquittal, contending that the evidence was insufficient to support a conviction of the offense charged in that it failed to exclude at least three hypotheses concerning the manner of

Charles M. McArthur's death, all of which hypotheses were consistent with a finding that the discharge of the gun was accidental, and that, therefore, petitioner was innocent. The motion for judgment of acquittal was again denied by the trial judge.

The trial was concluded on April 23, 1975, when the jury returned a verdict of guilty of murder in the first degree. Petitioner then renewed her motion for judgment of acquittal, again contending that the evidence was insufficient to support a conviction of the offense charged in the indictment, or any lesser included offense, because the evidence failed to exclude several reasonable hypotheses, all of which were consistent with the conclusion that the death of Charles M. McArthur had been accidental. In an order denying petitioner's renewed motion for judgment of acquittal, the trial judge concluded that the evidence had been legally sufficient to support the verdict.

On May 9, 1975, the trial judge adjudged petitioner guilty of the offense of murder in the first degree as charged in the indictment, and sentenced her to life imprisonment, with a provision that she be required to serve no less than 25 years before becoming eligible for parole.

Petitioner appealed the conviction, contending in her first three assignments of error that the trial judge's repeated denials of her motion for judgment of acquittal had been erroneous. The principal point argued to the Supreme Court of Florida on that appeal was that the evidence relied upon by the State to prove petitioner's guilt had been entirely circumstantial,

and was insufficient to exclude every reasonable hypothesis of innocence, so that the trial judge erred in denying petitioner's repeated motion for a judgment of acquittal. The relief requested by petitioner was reversal of the conviction and a remand with directions that petitioner be discharged.

On September 30, 1977, the Supreme Court of Florida rendered its opinion reversing the conviction on the sole ground that the evidence was legally insufficient to support that conviction. *McArthur* v. *State*, 351 So.2d 972 (Fla.1977) (A. 3).* In the course of its opinion, the Supreme Court of Florida found that the evidence presented at petitioner's trial was not inconsistent with all reasonable hypotheses of innocence (351 So.2d at 976; A. 11); that the evidence was not inconsistent with the conclusion that the death of petitioner's husband had been accidental (351 So.2d at 978; A. 14); that petitioner's "innocence ha[d] not been disproved" (351 So.2d at 978; A. 15); and that "[t]he state simply did not carry its burden of proof" (351 So.2d at 978; A. 15). However, the opinion concluded by directing that petitioner, "if the state so elects, be afforded a new trial." (351 So.2d at 978; A. 15.)

The State filed a petition for rehearing, claiming that the evidence had been legally sufficient to justify petitioner's conviction; that the homicide could not have been an accident; and that petitioner had failed to show that any reasonable hypothesis of innocence existed. The petition for rehearing was denied by the Supreme Court of Florida without opinion on

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* Hereinafter, (A. ____) shall refer to the appendices hereto.

December 6, 1977. On the same day, the Supreme Court of Florida issued its mandate to the circuit court, directing "that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida."

On December 20, 1977, the State filed a "Motion to Set Cause for Trial," thereby evincing its intent to retry petitioner on the charge of first degree murder made in the indictment returned on August 30, 1973. This was the same charge on which petitioner was previously tried and convicted, and the same charge which the Supreme Court of Florida concluded the State had failed, as a matter of law, to prove.

On January 4, 1978, petitioner filed in the circuit court a motion to dismiss, contending that compelling her to again stand trial on the charge of first degree murder would violate her right, under the Fifth and Fourteenth Amendments to the United States Constitution, not to be twice put in jeopardy for the same offense (Motion to Dismiss, at 1).

In an order dated January 20, 1978, and filed on January 23, 1978, the respondent Circuit Judge denied petitioner's motion to dismiss and granted the State's motion to set the cause for trial, directing that retrial of the cause shall commence on July 10, 1978 (A. 2).

On February 23, 1978, petitioner filed in the Supreme Court of Florida a suggestion for writ of prohibition, asking that court to grant a writ of prohibition directed to respondent Circuit Judge, prohibiting respondent Circuit Judge from attempting to exercise

any further jurisdiction over petitioner based upon the indictment returned on August 30, 1973. The suggestion for writ of prohibition stated that:

> "Respondent Circuit Judge is without jurisdiction to proceed further in the cause because, this Court having concluded that the evidence offered by the State at petitioner's previous trial was legally insufficient to justify her conviction, a retrial of petitioner on the same indictment for which she was previously tried would deprive petitioner of her right, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Florida Constitution, not to be twice placed in jeopardy for the same offense." (Suggestion for Writ of Prohibition, at 4.)

The Supreme Court of Florida denied petitioner's application for oral argument on her suggestion for writ of prohibition, and, without requiring any response to be filed by either the State or respondent Circuit Judge, on March 31, 1978, entered a one line order stating that: "Upon consideration of the Suggestion for Writ of Prohibition, it is ordered by the Court that said suggestion be and the same is hereby denied" (A. 1).

REASONS FOR GRANTING THE WRIT

Retrial of petitioner on the charge of first degree murder, after a successful appeal in which the Florida Supreme Court found that the evidence was legally insufficient to support the conviction, will deprive petitioner of her right under the Fifth and Fourteenth Amendments to the United States Constitution not to be placed twice in jeopardy for the same offense.

The instant petition presents the same question for review by this Court as does *Greene* v. *Massey*, 546 F.2d 51 (5th Cir.), *cert. granted*, 432 U.S. 905 (1977) (No. 76-6617), which case was argued before this Court on November 28, 1977. However, petitioner submits that the instant petition should be granted because the facts presented by this petition portray much more graphically than do the facts in the *Greene* case the fundamental unfairness of allowing a retrial on a charge which an appellate court has previously concluded the State failed, as a matter of law, to prove at the previous trial.

In the instant case, petitioner was indicted by an Okeechobee County, Florida, Grand Jury, which charged her with the first degree murder of her husband. She was tried and convicted of that offense, despite the fact that during and after the trial she repeatedly moved the trial judge to enter a judgment of acquittal, contending that the circumstantial evidence presented by the State was legally insufficient to prove her guilt beyond a reasonable doubt; that the evidence failed to show that the death of her husband could not have been accidental; and that the evidence failed to exclude several reasonable hypotheses, all of which were consistent with her innocence. All of these motions were denied by the trial judge.

On appeal of petitioner's conviction, the Supreme Court of Florida concluded that the evidence was not inconsistent with petitioner's innocence (351 So.2d at 976; A. 11); "that the prosecution's proof of Mr. McArthur's intentional murder was not inconsistent with his accidental death" (351 So.2d at 978; A. 14); that petitioner's "innocence ha[d] not been disproved" (351 So.2d at 978; A. 15); and that "[t]he state simply did not carry its burden of proof" (351 So.2d at 978; A. 15). These findings are susceptible to but one conclusion — the trial judge should have granted petitioner's repeated motion for judgment of acquittal, made during the trial. Yet, when petitioner sought to prevent a second trial on the ground that such a trial would deprive her of her right under the Fifth and Fourteenth Amendments to the United States Constitution not to be twice placed in jeopardy for the same offense, her motion was perfunctorily denied by respondent Circuit Judge. And when she attempted to invoke the assistance of the Supreme Court of Florida by means of a suggestion for writ of prohibition, that court, without allowing oral argument or requiring any reply by the respondent, summarily denied petitioner's request with a one sentence order.

In *Bryan* v. *United States*, 338 U.S. 552 (1950), this Court dealt for the first and only time with the contention that a second trial after reversal of a conviction for the same offense by an appellate court on the ground that the evidence was legally insufficient to justify that conviction deprived a defendant of his rights under the Fifth Amendment to the United States Constitution, which provides, in its relevant part, that

"[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."*

In a somewhat cryptic opinion, this Court dealt with what appeared to be a well-founded claim in one paragraph, saying merely that:

> "Petitioner's contention that to require him to stand trial again would be to place him twice in jeopardy is not persuasive. He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal. '* * * where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial.' Francis v. Resweber, 329 U.S. 459, 462, 67 S.Ct. 374, 375, 91 L.Ed. 422. See Trono v. United States, 199 U.S. 521, 533-534, 26 S.Ct. 121, 124, 50 L.Ed. 292, 4 Ann.Cas 773." 338 U.S. at 560.

Admittedly, the *Bryan* decision would appear at first glance to lend support to the decisions of the courts below. However, if one examines the cases relied upon for the conclusion reached in *Bryan*, it soon becomes apparent that the conclusion rests upon an unsound foundation. In the first place, the quotation from *Francis* v. *Resweber* (329 U.S. at 462) is dictum. Furthermore, the authority cited to support that statement was *United States* v. *Ball*, 163 U.S. 662 (1895), a

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* In *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969), this Court concluded that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage," which "should apply to the States through the Fourteenth Amendment."

case in which this Court concluded that there was no double jeopardy problem when the previous conviction had been reversed *for trial errors;* it had nothing to do with the propriety of a second trial after the previous conviction had been reversed because of insufficient evidence. Finally, it should be noted that *Trono* v. *United States,* 199 U.S. 521 (1905), the other case cited as authority by this Court in the *Bryan* decision, has since been severely limited, if not overruled completely, by this Court's decision in *Green* v. *United States,* 355 U.S. 184 (1957).

Green and other decisions of this Court subsequent to *Bryan* have eroded, if not discarded altogether, the waiver theory used in *Bryan* to justify the conclusion that a second trial after appellate reversal for insufficient evidence does not constitute double jeopardy. *See Breed* v. *Jones,* 421 U.S. 519 (1975); *United States* v. *Wilson,* 420 U.S. 332 (1975); *United States* v. *Tateo,* 377 U.S. 463 (1964); *Sapir* v. *United States,* 348 U.S. 373 (1955). Thus, in *Green, supra,* this Court dealt with the waiver theory in general as follows:

> "[T]he Government contends that Green 'waived' his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a *successful* appeal of his improper conviction of second degree murder. We cannot accept this paradoxical contention. 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. . . . When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice." 355 U.S. at 191-92.

Several lower federal courts have expressed their disagreement with the rule promulgated in *Bryan* and the frustrations they have in attempting to apply such a rule:

> "Unlike reversals due to procedural errors of law that impair effective presentation of the defendant's case, reversals based on the failure of the prosecution's proof represent the judgment of an appellate court that the defendant was entitled to a directed acquittal at trial. By subjecting defendants who win such appellate reversals to retrial, *Bryan* serves to heighten rather than mollify disparities inherent in our criminal justice system, for, had the defendants been before other trial judges, they may well have received the directed acquittals to which they were entitled — acquittals from which the prosecution would have no appeal. . . . By permitting defendants similarly situated with respect to their right to a directed acquittal to be treated differently, *Bryan* works to undermine rather than promote the fair and impartial administration of criminal justice." *Sumpter* v. *DeGroote,* 552 F.2d 1206, 1211-12 (7th Cir. 1977).

Similar frustration has been expressed by the District of Columbia Circuit in *United States* v. *Wiley*, 517 F.2d 1212 (D.C.Cir.1975). And the Third Circuit has said, completely disregarding *Bryan*, that "[r]eversals or mistrials granted on the basis of insufficient evidence or any other assessment of the facts presented at trial . . . bar reprosecution." *United States* v. *DiSilvio*, 520 F.2d 247, 249 n.3 (3rd Cir.), *cert. denied*, 423 U.S. 1015 (1975).

The findings made by the Supreme Court of Florida on petitioner's direct appeal of her conviction are susceptible to but one conclusion — the trial judge should have granted petitioner's repeated motion for judgment of acquittal, made during the trial. It is clear that, had the trial judge properly followed the law and granted petitioner's motion for judgment of acquittal, the State could not force her again to stand trial on the charge of first degree murder made in the indictment, even if it were subsequently found that the judgment of acquittal had been improperly granted. *See generally United States* v. *Martin Linen Supply Company*, 430 U.S. 564 (1977); *Fong Foo* v. *United States*, 369 U.S. 141 (1962).

The Fifth Amendment to the United States Constitution provides, in its relevant part, that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." This Court has said, concerning that provision, that:

> "The Clause, therefore, guarantees that the State shall not be permitted to make repeated attempts to convict the accused, 'thereby

> subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.' *Green* v. *United States*, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957); see also *Downum* v. *United States*, 372 U.S. 734, 736, 83 S.Ct. 1033, 1034, 10 L.Ed.2d 100 (1963). '[S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws.' *United States* v. *Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971) (Harlan, J.)." *United States* v. *Martin Linen Supply Company*, 430 U.S. 564, 569 (1977).

Assuming this statement of purpose to be of continuing vitality, there is no logical basis whatsoever for concluding that, while a defendant who has been successful in obtaining a judgment of acquittal upon motion made to the trial judge may not be tried again for the same offense, a defendant whose motion for judgment of acquittal was erroneously denied by the trial judge but who was successful in obtaining reversal on appeal solely because the evidence was legally insufficient to justify the conviction, may be tried again. As one court has said:

> "We can see no essential difference — except one of unfairness — between a defendant who

> is acquitted at trial and one who has to appeal to obtain reversal of a conviction on the ground of insufficient evidence. Surely, it would compound the unfairness to require that the latter also submit to a retrial." *People* v. *Brown*, 99 Ill.App.2d 281, 241 N.E.2d 653, 659 n.2 (Ct.App.1968).

In this regard, a growing vanguard of state appellate courts has concluded that retrial of a defendant whose conviction has been reversed on the ground that the evidence offered at the previous trial was insufficient to justify the conviction is prohibited by principles of double jeopardy. *See, e.g., State* v. *Torres*, 109 Ariz. 421, 510 P.2d 737 (1973); *People* v. *Rutt*, 179 Colo. 180, 500 P.2d 362 (1972); *Hervey* v. *People*, 178 Colo. 38, 495 P.2d 204 (1972); *People* v. *Woodall*, 61 Ill.2d 60, 329 N.E.2d 203 (1975); *People* v. *Brown*, 99 Ill.App.2d 281, 241 N.E.2d 653 (Ct.App.1968); *People* v. *Banks*, 37 Mich.App. 280, 194 N.W.2d 488 (Ct.App.1971); *State* v. *Moreno*, 69 N.M.113, 364 P.2d 594 (1961); *State* v. *Alston*, 26 N.C.App. 418, 216 S.E.2d 416 (Ct.App.1975).

In *State* v. *Moreno, supra*, the Supreme Court of New Mexico, reviewing a conviction for possession of marijuana with intent to unlawfully sell and deliver it, examined the record and found it to be devoid of evidence to support the conviction. The court reversed and remanded with instructions to discharge the defendant, saying:

> "The effect of a reversal for lack of sufficient evidence to support a conviction is not different from an acquittal by the jury and requires that the defendant be discharged." 364 P.2d at 595.

In *People* v. *Brown, supra*, a case containing an excellent discussion of the question, the court dealt with the argument, sometimes raised, that when a defendant moves for a new trial as well as for a judgment of acquittal, he waives his right to stand behind the double jeopardy clause, even though the appellate court finds that the evidence was legally insufficient, and a new trial may be awarded. The court said:

> "We can think of no reason in fairness and justice why a defendant on appeal should be required to discard his right to seek a new trial based on trial errors, in order to validate his right to seek an outright reversal for lack of evidence. In any sensible consideration of his position the former is seen to be a second-choice alternative to the latter. If his double jeopardy rights are deemed to have been waived by his request for a new trial, the waiver should then take effect only if the reversal is granted for the reasons contained in the new-trial request, and, if the conviction is reversed for lack of evidence, the waiver contained in an accompanying request for a new trial would never become operative." 241 N.E.2d at 662.

Commentators addressing this subject have overwhelmingly questioned the fundamental fairness of decisions which conclude that compelling a defendant to stand trial a second time after his prior conviction

was reversed on appeal for insufficient evidence does not place him twice in jeopardy for the same offense. The two leading authorities on federal practice have called such decisions "illogical" and "fundamentally inconsistent with the Double Jeopardy clause." *See* 8A J. Moore, Federal Practice ¶ 29.09[2] (1977 ed.); 2 C. Wright, Federal Practice and Procedure (Criminal) §470 (1969 ed.).

One author has noted a recent trend toward application of the double jeopardy clause to prohibit retrial after reversal by an appellate court for insufficient evidence. *See* C. Thompson, "Reversals for Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal," 8 Ind.L.Rev. 497 (1975). The author concludes that:

"The arguments favoring application of the double jeopardy clause to appellate reversals for insufficient evidence are compelling. At the first trial the State exercised its opportunity to convict the accused and, as a matter of law, the evidence failed to establish guilt. Should the State be given the opportunity to buttress its case at a second trial or, for harassment only, seek a second guilty verdict on the same insufficient evidence? By reason of the insufficiency the judgment of conviction was reversed. Clearly, the defendant should have been acquitted in the trial court, and that acquittal would have barred a second trial for the same offense. Logic would dictate a similar result when the acquittal comes at the appellate level, for it is a miscarriage of

justice that the defendant was not acquitted at trial." *Id.* at 501-02.

If it is permissible for the State to try petitioner a second time for the same offense, at what point is it no longer permissible for the State to retry petitioner? Suppose that petitioner is again convicted, again appeals, and the evidence is again found legally insufficient. May the State try her again? This is precisely why the prohibition upon placing an individual twice in jeopardy for the same offense was included in the Bill of Rights. Without such a safeguard, the State must, because of the vast resources it possesses, sooner or later emerge successful in breaking, if not convicting, the defendant in a criminal prosecution of this type.

Fundamental concepts of justice dictate that the State should be given only one fair opportunity to introduce evidence sufficient to convict an individual whom it charges with a crime. To the extent that the decision of this Court in *Bryan* v. *United States, supra*, suggests a contrary result, that decision is illogical, arbitrary and fundamentally unfair, and should be overruled. The State has had one fair opportunity to present evidence sufficient to justify petitioner's conviction, and has failed. It should not be permitted to try petitioner again.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the order of the Supreme Court of Florida denying petitioner's suggestion for writ of prohibition.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF FLORIDA

FRIDAY, MARCH 31, 1978

NADEAN O. McARTHUR,
Petitioner,

versus Case No. 53,465

PHILIP G. NOURSE, Circuit Judge, etc.,
Respondent.

Upon consideration of the Suggestion for Writ of Prohibition, it is ordered by the Court that said suggestion be and the same is hereby denied.

OVERTON, C. J., SUNDBERG, HATCHETT and KARL, JJ., concur
ENGLAND, J., dissents

APPENDIX B

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR
OKEECHOBEE COUNTY

STATE OF FLORIDA

versus Case No. 73-74-CF

NADEAN O. McARTHUR,
Defendant.

ORDER

The Court has before it the motion to set cause for trial filed by the State on December 20, 1977, and the motion to dismiss the indictment on the ground of double jeopardy filed by the defendant on January 4, 1978. The Court having considered these motions, and having heard argument of counsel thereon, it is

ORDERED that:

1. The motion to dismiss the indictment on the ground that a retrial of defendant would place her twice in jeopardy for the same offense in violation of the United States and Florida Constitutions, filed by defendant on January 4, 1978, is denied.

2. The motion to set cause for trial, filed by the State on December 20, 1977, is granted, and retrial of this case shall commence on July 10, 1978.

3. This order is without prejudice to the right of either the State or defendant to seek a change of venue.

DONE AND ORDERED in Chambers, at Ft. Pierce, St. Lucie County, Florida, this 20th day of January, 1978.

/s/ Philip G. Nourse
Circuit Judge

APPENDIX C

IN THE SUPREME COURT OF FLORIDA
JULY TERM, 1977

NADEAN O. McARTHUR,
Appellant,

versus Case No. 49,526
Circuit Court
Case No. 73-74-CF

STATE OF FLORIDA,
Appellee.

Opinion filed September 30, 1977

An Appeal from the Circuit Court in and for Okeechobee County, James E. Alderman, Judge

Chester Bedell, Jacksonville; Eugene P. Spellman, Miami; and Raymond E. Ford, Fort Pierce, for Appellant

Robert L. Shevin, Attorney General, Tallahassee; Harry M. Hipler, and Basil S. Diamond, Assistant Attorney Generals, West Palm Beach, for Appellee

ENGLAND, J.

By direct appeal we have before us for review the 1975 conviction of Nadean McArthur for the first degree murder of her husband, Charles McArthur. We have jurisdiction because the trial court upheld the validity of two statutes, Sections 40.01(1) and 775.082(1), Florida Statutes (1975).[1]

Appellant argues that, in addition to the two constitutionally infirm statutes, reversal of her conviction is required by six errors which occurred during her trial. After careful examination of the record, we find that five of these contentions require neither reversal nor extensive discussion.[2] Appellant's

1 Appeal was first taken to the Fourth District Court of Appeal, but pursuant to Fla.App.Rule 2.1(a)(5)(d) that court on its own motion transferred the appeal here.

2 First, the exclusion of lay opinion regarding appellant's emotional state immediately after her husband's death, though technically error, was not so prejudicial as to require reversal in light of other testimony which was adduced as to her conduct and statements. Second, the requested jury instruction on circumstantial evidence was generally repetitive of an instruction which was given, and though it would not have been error to give the instruction to the jury by the same token its rejection was not an abuse of the trial court's discretion. Third, the pretrial publicity which attended appellant's trial did not make it impossible to select an impartial jury as a matter of law or fact. Murphy v. Florida, 421 U.S. 794 (1975); Dobbert v. State, 328 So.2d 433 (Fla. 1976), *aff'd*, 45 U.S.L.W. 4721 (June 17, 1977).

Fourth, the limitations placed on defense counsel's voir dire examination of prospective jurors were carefully drawn to avoid tainting the jury panel with the substance of rumors which some

constitutional challenges require more detailed analysis, but similarly do not warrant reversal.

Appellant's challenge to the jury selection statute, Section 40.01(1), Florida Statutes (1975), essentially asks that we reconsider *Wilson v. State*, 330 So.2d 457 (Fla.1976), in which we sustained this statute, in light of the United States Supreme Court's decision in *Taylor v. Louisiana*, 419 U.S. 522 (1975). That case held unconstitutional a Louisiana jury selection statute which operated to exclude women from jury service, since they were exempt unless requesting to serve, on the ground that the statute deprived defendants of their right to a jury selected "from a fair cross section of the community".[3] At the time of trial the Florida statute provided in relevant part that

> "expectant mothers and mothers with children under eighteen years of age, upon their request, shall be exempted from grand and petit jury duty."[4]

The record fairly depicts the operation of the statute. Several mothers with children under the age of 18

prospective jurors might have heard. *Accord*, Jones v. State, 343 So.2d 921 (Fla. 3d DCA 1977). In fact, the record quite clearly shows that the jurors were not preconditioned to find for or against appellant, and that they were able to reach their conclusions solely on the basis of the evidence presented at trial. Finally, the trial judge did not abuse his discretion by refusing to sequester the jury. Fla.R.Crim.P. 3.370(a). On the contrary, he made a careful and determined inquiry into the need for sequestration and found that the fears of defense counsel, and his own preliminary concerns, were without basis in fact.

3 Taylor v. Louisiana, 419 U.S. at 530 (1975).

4 The 1975 Legislature lowered the statutory age from 18 to 15. Ch. 75-78, Laws of Florida.

were excused from jury service on the representation that hardship would be suffered if they could not be at home to care for their children. Some mothers were excused under the statute simply "upon their request", even though they held jobs outside the home and made no plea of hardship. One father asked to be excused because of the hardship to his seven motherless children if he could not earn his $110 weekly income. His request was denied by the court; however, counsel for both sides later requested that he be excused and the trial judge acceded. No expectant mothers were present to request exemption from jury duty.[5]

Since mothers with children under 18 were exonerated from jury duty simply on request, our concern is whether their absence denied defendants the opportunity to select a jury from a fair cross section of the community. We think not. The sixth amendment to the United States Constitution requires that no "large, distinctive groups are excluded from the [jury] pool".[6] This standard establishes two tests, and although the excluded group here appears sufficiently large to pass the "size of group" test, it fails what may be called the "nature of the group" test.

To evoke constitutional concern, the group excluded must be sufficiently "distinctive" to eliminate "the

5 No suggestion is made in this case that the state lacks a justification for providing expectant mothers with an exemption. In *Taylor*, the Supreme Court said:

> "The States are free to grant exemptions from jury service to individuals in case of special hardship or incapacity and to those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare." 419 U.S. at 534.

See also Kahn v. Shevin, 416 U.S. 351 (1974).

6 Taylor v. Louisiana, 419 U.S. at 530.

subtle interplay of influence" or the "distinct quality [which] is lost if either sex is excluded" totally.[7] Mothers of young children are not, we believe, so distinctive a class as to evoke sixth amendment concerns. Those eligible for jury service include mothers of older children, women without children, and fathers with children of all ages. No distinctive quality of parenthood or sex is lost by the exclusion of mothers who presently have children under 18.[8] Thus, while the legislative exclusion does not require hardship and may therefore operate automatically to exempt from jury service mothers who have no more compelling need to tend young children than fathers or the parents of older children, the class excluded is not constitutionally significant.

Appellant's second constitutional challenge asserts the invalidity of Section 775.082(1), Florida Statutes (1975), which requires a person convicted of a capital felony and sentenced to life imprisonment "to serve no less than 25 years before becoming eligible for parole . . . ." We have already upheld this statute against an assertion that it is an impermissible legislative

7 Ballard v. United States, 329 U.S. 187, 193-94 (1946), cited with approval in Taylor v. Louisiana, 319 U.S. at 531-532.

8 Although mothers of young children in contemporary society may have different attitudes or experiences than mothers of older children, our concern is a constitutional imperative. That there is an arguable sociological distinction of importance is a matter for the Legislature to consider.

> "The fair-cross-section principle must have much leeway in application. The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community."

Taylor v. Louisiana, 419 U.S. at 537-38.

usurpation of executive branch powers.[9] Appellant here contends that the statute imposes a cruel and unusual punishment, since it operates without regard to the circumstances of individual defendants or the crimes for which the defendants have been convicted. The state argues that the severity of the penalty is commensurate with the severity of the crime.

This very issue was recently addressed by the Second District Court of Appeal in *Quick v. State*, 342 So.2d 850 (Fla.2d DCA), aff'd per curiam, No. 51,246 (Fla.Sept. 29, 1977), in which a majority of the court upheld the statute. Judge McNulty filed a forceful dissent analogizing the situation to *Woodson v. North Carolina*, ___ U.S. ___, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), where the United States Supreme Court ruled that a mandatory death penalty for first degree murder is cruel and unusual punishment. We believe the *Quick* majority was correct, for in *Woodson* the Court recognized that term sentencing minima are significantly different from death sentences as regards federal constitutional criteria. The Court said:

> "While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy *rather than a constitutional imperative*, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular

9 Owens v. State, 316 So.2d 537 (Fla.1975); Dorminey v. State, 314 So.2d 134 (Fla.1975).

> offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long."[10] (emphasis supplied.)

Relevant to the same concerns under Florida's Constitution is *O'Donnell v. State*, 326 So.2d 4 (Fla.1975), in which we upheld a statute imposing a mandatory minimum sentence of 30 years imprisonment for kidnapping.[11] In *O'Donnell* we reaffirmed the time-honored principle that any sentence imposed within statutory limits will not violate Article I, Section 8 of the Florida Constitution, and the reasoning used there is persuasive here. The correlation in seriousness and potential deterrent value between a minimum 30 year sentence and the crime of kidnapping is similar to the correlation between the minimum mandatory sentence imposed by Section 775.082(1) and the palpably more serious crime of premeditated murder. All this, of course, was at the heart of *Banks v. State*, 342 So.2d 469 (Fla. 1976), in which we rejected the very contention which appellant now raises. We held in *Banks* that this statute did not impose constitutionally proscribed cruel and unusual punishment, and we now reiterate that view.

10 Woodson v. North Carolina, ___ U.S. ___, 96 S.Ct. 2978, 2991-92, 49 L.Ed.2d 944, 961 (1976).

11 § 775.082(4)(a), Fla.Stat. (1973).

We come to appellant's last and principal contention before us, that as a matter of law there was insufficient evidence of her guilt to support her conviction. Appellant and the state agree as to the legal standard to be applied in cases where a conviction is based on circumstantial evidence,[12] as here, but they sharply disagree as to the application of that standard to the record in this case.

A review of prior decisions of this Court in similar cases[13] is not helpful to the analysis required here, since the nature and quantity of circumstantial evidence in each case is unique. Moreover, while we have examined all of the evidence in the record before us, we can see no jurisprudential value in a lengthy

12 Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Davis v. State, 90 So.2d 629 (Fla.1956); Mayo v. State, 71 So.2d 899 (Fla.1954); Head v. State, 62 So.2d 41 (Fla.1952). (The meaning of "not inconsistent" may be sufficiently different from "consistent" as to prevent a substitution of terms.) In applying the standard, the version of events related by the defense must be believed if the circumstances do not show that version to be false. Mayo v. State, above; Holton v. State, 87 Fla. 65, 99 So. 244 (1924).

13 This case is not similar to those in which a particular circumstance is consistent only with one conclusion. In Davis v. State, n. 12 above, for example, the state's own witness in a murder trial placed the time of the victim's death at a time when the accused was assisting law enforcement officers in a search for the victim. In Dewey v. State, 135 Fla. 443, 186 So. 224 (1938), the accused's pretrial story that his wife's death was caused by a single self-inflicted gunshot was totally discredited by proof that two shots had been fired. Nor is this case in any way similar to those in which the only hypothesis of innocence is wholly incredible. In Kersey v. State, 73 Fla. 832, 74 So. 983 (1917), for example, the only hypothesis of innocence was a suicide so bizarre in contrivance as to be inherently unbelievable.

recitation of that evidence in this opinion. A lengthy summary will suffice.

In general, the jury received two categories of circumstantial evidence — scientific and non-scientific. Our study of both types leads us to conclude that, on balance, neither is inconsistent with innocence.[14]

The non-scientific evidence in the record, consisting of witness testimony from the funeral home owner, ambulance drivers, police officials, and a local merchant,[15] is reasonably consistent with the version of events which appellant conveyed to investigating officers when they first arrived at the scene of her husband's death. She had told the officers that her husband had been concerned about her and their child's

14 Minor inconsistencies between appellant's statements and acts at the scene of the death and the proof relied upon by the state to evidence appellant's guilt create ambiguities in the tenor of proof, at best. Two examples will indicate the nature of these inconsistencies. Evidence was adduced regarding appellant's emotional state following the shooting. That evidence is consistent both with the state's theory that she was a calm murderess, calculating how to conceal her guilt, and with the defense's theory that she was in a state of shock. The state also presented evidence that appellant did not wait on her front doorstep for the ambulance to arrive and that she made coffee for the ambulance driver when he requested it. Both alone and with other facts, however, the damning effect of this evidence can be classed as ambiguous, if not explainable. The state, of course, draws from these bare facts a behavioral sketch of calm calculation, consistent with cold-blooded murder. The defense would explain them as being a product of shock. The defense also contradicted the adverse implication of the coffee facts by the testimony of the operator of the ambulance service who received Mrs. McArthur's call for assistance. The operator testified she had told appellant not to go into the bedroom where her husband's body lay, but rather "to go out to the kitchen and be busy making coffee, do something and our attendant would be there in a few minutes."

15 Appellant herself did not testify at the trial.

safety during his many absences, and that he had asked her to take out and check a gun which had been purchased two years before, in order to be sure she could handle it. While her husband lay in bed on his left side, she sat with the gun indian-style on the bed facing him, half on a pillow and half off. She told the officers that she had forgotten how the gun functioned and was fumbling with it, apparently while it was still inside a cloth bag. Her husband became impatient, grabbed for the gun, it went off, and he was shot in the head.

Appellant related the same outline of events to each other person who inquired as to what had occurred, except to one officer who stated that he was told the "gun fell, hit her knee, and went off". Although this officer was present at the scene of death with others who received a different explanation, no inquiry was made as to the conflict in statements, and the one officer's recitation is the only conflicting explanation in the record. Another witness to the same conversation in fact had no recollection of this statement by appellant.

All attempts by the state and by the defense to elicit from witnesses more details of appellant's statements at the time of death were unsuccessful. Based on the non-scientific conflicting evidence, we cannot accept the state's view that all reasonable hypotheses of innocence are incompatible with the record.

Both sides introduced fairly complex scientific evidence to explain or defeat appellant's hypothesis of an accidental shooting. Experts testified that it would have been possible for the gun to fire accidentally if

Mr. McArthur had grabbed for the gun and any one of three alternative acts had occurred: (1) he had hit the trigger while the hammer was in a full-cocked position, (2) he had caused the hammer to be released while the gun was held partially cocked by appellant, or (3) he had hit against the hammer, pushed it to a partially cocked position and then it automatically fell back. The gun also might have fired accidentally if it had been held upside down in the bag with portions of the cloth wrapped around the hammer or trigger in a particular manner, and if Mr. McArthur had grabbed and pulled the bag. There is no evidence that the gun had been or had not been in the full-cocked position when appellant was fumbling with it.

The gun was fired at a distance of about seven inches from Mr. McArthur, which is consistent with appellant's theory that Mr. McArthur leaned forward to grab for the gun. The presence of smudge marks (cylinder flare) on the underside of one pillow shows that the gun was fired when very close to the pillow, another fact consistent with appellant's contention that she was sitting partially on the pillow, thereby causing the other half to rise slightly. (The location of these marks, we recognize, is also consistent with the state's suggestion that she was holding the gun close to the pillow when she intentionally murdered her husband.[16]) The presence of barium and antimony on

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16 The prosecution took conflicting positions on this point before the trial court and jury. In closing argument the prosecution theorized that appellant held the pillow over the gun when she murdered her husband in order to muffle the sound, but when the defense attempted to elicit expert testimony that the pillow could not have been wrapped over the gun without causing "double" cylinder flare marks, the state conceded to the trial judge that the first theory was untenable. As a consequence the expert was allowed to testify that the pillow could not have been held over the gun.

Mr. McArthur's hands is consistent both with the gun having been fired intentionally while his hands were raised in a defensive posture, as the state suggests, and with the gun having fired accidentally when one of Mr. McArthur's hands hit the hammer as he braced his weight and leaned forward to grab the weapon.

The angle by which the bullet entered Mr. McArthur's head, and the pattern of blood on the wall, are consistent both with his leaning forward to grab the weapon and appellant's having shot him while his head was raised at least one foot off the bed. Similarly, the pattern of blood on the pillow was consistent with appellant's version of the pillow's placement where she was sitting.[17]

From the totality of scientific and non-scientific evidence at appellant's trial, we are forced to conclude that the prosecution's proof of Mr. McArthur's intentional murder was not inconsistent with his accidental death. The jury could reasonably have concluded, and obviously did conclude, that it was more likely that appellant murdered her husband than that she did not. Yet "even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence".[18] On this record appellant's innocence has not been disproved. Only she knows the truth, and it was and is her constitutional right not to offer her explanation, her demeanor, her candor and her credibility to the jury. The state simply did not carry its burden of proof. Our jurisprudence and the justice of the cause require that the conviction entered below be reversed and that appellant, if the state so elects, be afforded a new trial.

17 The evidence is uncontradicted that the pillow was moved at least once before police photographed the scene, so it became impossible to prove how the pillow was positioned at the time the gun was fired. However, the bloodstains and tissue on the pillow indicate that, at least very shortly after the shot, the pillow was positioned where appellant said it had been. The state argued to the jury that appellant moved the pillow to the place on the bed where it was found when the police photographed the scene. This suggested a theory itself inconsistent with her guilt because it assumed a murderess would rearrange physical evidence so that it would be inconsistent with her story. Obviously, no inference relevant to appellant's guilt can be drawn from the fact that the pillow may have been negligently moved by one of the police officers or one of the ambulance attendants.

It is so ordered.

OVERTON, C.J., HATCHETT and KARL, JJ., Concur
BOYD, J., Concurs in part and dissents in part with an opinion
ADKINS and SUNDBERG, JJ., Dissent

BOYD, J., Concurring in part and dissenting in part.

I concur in that part of the majority opinion quashing the murder conviction of appellant. If a new trial is to be held, the venue should be changed.

In *Griffis v. Hill*, 230 So.2d 143 (Fla. 1969), this Court held that whenever an appellate court concludes that a jury of reasonable people could not have reached the verdict under consideration without a mistake of law or fact, it is the duty of the court to quash the judgment. A careful review of all of the evidence in this case

18 Davis v. State, n. 12 above at 632.

leads me to conclude that the quantum of proof against appellant at the trial was inadequate to prove appellant's guilt beyond and to the exclusion of any reasonable doubt.

Although some jurisdictions permit a new trial of an accused person by the government when convictions are reversed due to insufficient evidence, it is my opinion that such action constitutes double jeopardy, in contravention of the Fifth Amendment to the Constitution of the United States and Article I, Section 9 of the Florida Constitution. I therefore would dissent to that portion of the opinion requiring a new trial.